Supreme Court, U.S.
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No. 90-1669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TYLER C. DIXON,

Petitioner,

v.

RICHARD N. HUBERT and CHAMBERLAIN, HRDLICKA, WHITE, JOHNSON AND WILLIAMS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

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BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents object to the Petitioner's "Questions Presented" both because they are presented in violation of United States Supreme Court Rule 14.1.(a) and because they were not raised in the trial court.

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JURISDICTION

Contrary to Petitioner's assertion, Petitioner did not "timely raise[ ] the constitutional questions of denial of due process and equal protection of the laws under the Fourteenth Amendment." Petitioner's Brief at 2. Specifically, Petitioner filed only one document in the trial court that even touched on the United States and Georgia Constitutions. That document was entitled "Motion for Continuance and for Bench Trial (with Alternative Motion to Declare Statute Unconstitutional)," and is attached hereto as Appendix A. After the trial court gave Petitioner both a continuance and a bench trial, he never again raised any constitutional issues until after he lost and appealed.

STATEMENT OF THE CASE

A simple recitation of what actually occurred in this case should make it clear why this is not a proper case for a writ of certiorari. Among other things, it will be demonstrated that Petitioner has repeatedly misstated the facts, and continues to do so, has mischaracterized the actions and rulings of the Superior Court, the Court of Appeals, and the Supreme Court of Georgia, and asks this Court to rule on numerous issues that were not properly presented in the state courts and in most cases not presented at all.

Alexander Lostocco, the Plaintiff below and Petitioner's client at the commencement of this suit, controlled Jinna Management, Inc. ("Jinna"). Jinna was the managing partner in Airport Parking Venture I ("APVI"), a general partnership that operated a business known as the "Carport." Alan Aycock, one of the Defendants below, was a partner in Tripoint Holdings, Ltd. ("Tripoint"), which was also a partner

in APVI. T. 16, 205.[1] Thus, in essence, Mr. Lostocco and Mr. Aycock were partners.

When the Carport began losing a lot of money, on the order of a million dollars a year, Mr. Aycock became concerned. T. 16, 19, 140. On behalf of himself and Tripoint he went to see Respondent Richard N. Hubert, an attorney, for advice about protecting his investment. *Id.* Respondent Chamberlain, Hrdlicka, White, Johnson and Williams ("CHWJW") is Mr. Hubert's law firm. T.138.

Mr. Hubert conducted a preliminary investigation that corroborated many of the suspicions and concerns that Mr. Aycock had communicated to Mr. Hubert when he was retained. T. 146; T. 490-92. Even so, Mr. Hubert did not advise Mr. Aycock to file suit immediately, as he would have been justified in doing. Instead, he wrote a letter to his client reporting that he had conducted an investigation and that there was sworn evidence to support Mr. Aycock's belief that the Carport was being mismanaged in numerous very serious ways. *See* Letter from Richard N. Hubert, Esq. to Alan S. Aycock (Aug. 22, 1988), Appendix N to the Petition for Writ of Certiorari; T. 148, 490-92. Mr. Hubert indicated in the letter that various courses of action—for example, seeking a receivership—should be considered. At the close of the letter, Mr. Hubert advised Mr. Aycock to discuss the matter with his partners—discuss the matter, *not* distribute the letter—and get back to Mr. Hubert so that a proper course of action could be chosen. T. 492.

That is where Mr. Hubert's involvement in the events leading to this lawsuit began and ended. He

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[1] References to the trial transcript will be cited as T. ____ .

was retained, he conducted a preliminary investigation, and he wrote a confidential letter of advice to his client. He did nothing else. T. 148.

As it turned out, Mr. Aycock, concerned about his interest in APVI, contacted Richard Felker, another partner in the Carport, and told Mr. Felker that he had consulted counsel. Mr. Felker asked whether Mr. Aycock had received anything in writing from his attorney and Mr. Aycock said he had. Mr. Felker then asked for a copy of the letter and Mr. Aycock gave him one. T. 20-21. Mr. Felker then hired an accounting firm, Coopers & Lybrand, to perform an audit of the Carport's books. T. 22.

Somehow a copy of the letter wound up in Mr. Lostocco's hands. Mr. Lostocco's suit[2] against Mr. Aycock, Mr. Hubert and CHWJW followed. *See* Complaint (filed Oct. 5, 1988), R. 17. Count I of the Complaint, as amended, was styled "Defamation/Invasion of Privacy," and appeared to allege that Mr. Hubert's letter advising Mr. Aycock defamed Mr. Lostocco and invaded his privacy. R. 19-23. Count II of the Complaint, as amended, alleged that the same letter constituted tortious interference with Mr. Lostocco's contractual relations. R. 23-25. Count III of

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[2] Actually, Mr. Lostocco was not the only Plaintiff. Mr. Dixon also sued on behalf of Professional Auto Care, Inc. and MmanTec, Inc., two of Mr. Lostocco's companies, even though he has never articulated any theory under which those companies might have had a cause of action. Because it seemed so apparent that even Mr. Lostocco had no grounds for a lawsuit, Respondents Hubert and CHWJW have never argued at length the frivolousness of a suit by the two companies, but their inclusion without explanation does indicate Mr. Dixon's nonchalance about filing legal claims.

the Complaint sought punitive damages, and Count IV sought the expenses of the litigation. R. 25-26. CHWJW apparently was sued on the basis of vicarious liability.

Although the Petition filed in this Court has much to say about the document "Carport-Legal Questions & Strategy,"[3] which was furnished to Mr. Hubert by his client, Aycock, that document was not mentioned in the Complaint. The Complaint clearly relies upon the Hubert letter and reliance upon the other document is after the fact. At the deposition of Mr. Lostocco, taken early in the case, the very first question (by Hubert's counsel) and answer were as follows:

> Mr. Gibert: Mr. Lostocco, as you know, I represent Richard Hubert and Chamberlain, Hrdlicka, who are the law firm and lawyers who are also the authors of the exhibit today that has been exhibited as D1, and lets see if I can get through this quickly. Precisely what are your grievances against Mr. Hubert? Rather, are they limited to that letter?
>
> Mr. Lostocco: Yes.

Deposition of Alexander Lostocco ("Lostocco Depo.") at 210, Appendix B at 11a.[4]. Thus, it was established from the beginning that Mr. Dixon's client's only

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[3] Petitioner calls this document the "Strategies and Tactics Memo," for some reason eschewing its actual heading.

[4] Excerpts from Mr. Lostocco's deposition are attached as Appendix B.

grievance against Mr. Hubert was that he did not like what Mr. Hubert said in a letter to his own (Hubert's) client.

Apparently because the basis of the Complaint was an attorney's letter to his client, which under Georgia law is conditionally, if not absolutely, privileged, Mr. Dixon included in the Complaint allegations that Mr. Hubert acted with malice and that it was Mr. Hubert's "intent, expectation and foresight" that the letter be distributed. R. 20. During Mr. Lostocco's deposition, however, it became quite clear that there was no evidence to support those assertions. With respect to Mr. Hubert's alleged malice, Mr. Lostocco testified as follows:

> *Q.* Okay. And you have no reason to suppose that Dick Hubert holds any personal malice or animosity toward you, do you?
> *A.* No.
> . . . .
> *Q.* I want you to tell me if you know some facts that indicate to you that Dick Hubert had some purpose to do something other than write and give his client some advice. He, personally, Dick Hubert personally. Do you have some basis for thinking he had some purpose other than to write and give his client some advice?
> *A.* I don't know.
> *Q.* You don't know of any, [or] you don't have any basis?
> *A.* I just said I don't know.

Lostocco Depo. at 213, 216, Appendix B at 12a, 13a. Likewise, after *Mr. Dixon* stated in the deposition

that the letter was distributed "in accordance with the instructions of the letter," the following exchange between Mr. Hubert's counsel and Mr. Lostocco took place.

> *Q.* You find some instructions in the letter that the letter be disseminated?
> *A.* Sure. Second page, second or third page.
> *Q.* Where? Are you referring to the language "I would invite you to discuss this with your partners?"
> *A.* Yeah.
>
> . . . .
>
> *Q.* Now, is the letter, what's in the letter and the fact that Dick Felker had possession of it your entire evidence on that point?
> *A.* Yeah.

Id. at 217, 225-26, Appendix B at 14a-16a. In short, Mr. Dixon's entire "evidence" on Mr. Hubert's alleged malice and/or conspiracy to injure Mr. Lostocco was the single sentence from the letter that follows:

> I would invite you to discuss this with your partners and get back to me as soon as possible in order that we might formulate some reasonable course of action to conclude this situation.

Petition for Writ of Certiorari Appendix N, at 45a.

Even if this language could bear the extraordinary construction Mr. Dixon lent it, and thereby support a defamation claim, Mr. Dixon still had no evidence whatsoever to justify pursuing the tortious interference and invasion of privacy claims. Mr. Dixon's theory with respect to tortious interference was that the letter caused Richard Felker to ask for Mr. Lostocco's

resignation, *see* T. 120, but Mr. Lostocco and Mr. Dixon were aware that that was not true. Richard Felker testified at the hearing on attorneys' fees that he told Mr. Lostocco that he was being asked to resign because reports from the auditors and from Ron Cates, an interim manager, indicated that the Carport had been mismanaged. T. 95-97, 103. Thus there was no proof that the letter had caused any interference.

With respect to the privacy claim, there was, essentially, no *theory*. When asked in his deposition about the basis for this claim, Mr. Lostocco complained that someone had sent his wife a newspaper article reporting allegations of sexual harassment that had been lodged against him. Lostocco Depo. at 229, Appendix B at 17a. Counsel then inquired whether Mr. Lostocco had any reason to believe that Mr. Hubert was involved with that. Mr. Lostocco replied that he did not. *Id.*

In view of these statements by the Plaintiff, counsel for Mr. Hubert and CHWJW informed Mr. Dixon, both orally and in writing, that the Plaintiffs' claims were entirely without merit. T. 111-12. Mr. Dixon acknowledged in his testimony in the attorneys' fees hearing that Mr. Hubert's counsel repeatedly warned him that the suit was frivolous and cited case law in support of that conclusion. T. 112. At Mr. Lostocco's deposition, counsel for Mr. Hubert informed Mr. Dixon that he would be putting himself personally at risk under O.C.G.A. § 9-15-14 if he continued with the suit. T. 111-12. Mr. Dixon persisted nonetheless, causing

Mr. Hubert and CHWJW to incur approximately $60,000[5] in legal fees and expenses. T. 150-51.

Finally, on June 22, 1989, after eight months of expensive trial preparation, the Plaintiffs voluntarily dismissed the entire action. *See* R. 127. Mr. Hubert and CHWJW filed a timely motion for attorneys' fees under O.C.G.A. § 9-15-14. *See* R. 136. Section 9-15-14 requires an award of attorneys' fees against either a party or his attorney when they have asserted a claim "with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not reasonably be believed that a court would accept the asserted claim." *Id.* § 9-15-14(a). The Code section further allows the court discretion to award fees against a party or his attorney when an action brought "lacked substantial justification." *Id.* § 9-15-14(b). The matter was extensively briefed by all the parties. *See* R. 202, 246, 321, 519, 777.

On October 11, 1989, three months after Mr. Hubert and CHWJW filed their motion for attorneys' fees and two days prior to a scheduled hearing on the motion, Mr. Dixon filed a motion for a continuance and a bench trial. *See* Motion for Continuance and for Bench Trial (with Alternative Motion to Declare Statute Unconstitutional) (Oct. 11, 1989), R. 1526, Appendix A. The motion asked for "an evidentiary trial, including the right to present witnesses on his behalf, and the right to confront and cross examine those witnesses presented by other parties." Appendix A at 2a-3a. The motion also asked for a

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[5] The suit brought by Mr. Dixon against Respondents sought damages in excess of $10,000,000.

six-month discovery period dated from August 14, 1989. *Id.* at 6a.

The trial court did not enter a formal order on the motion. The case was removed from the calendar, however, and an evidentiary trial was scheduled for December 3, over seven weeks later. No particular discovery period was approved, but Mr. Dixon served Mr. Hubert and CHWJW with interrogatories and document requests on October 25. *See* R. 1548, 1553. Mr. Hubert and CHWJW responded without objection.

When court commenced on December 4, the Court proposed that jury selection begin, but both parties agreed that the trial was to be non-jury. T. 13. Mr. Hubert undertook the burden of proving that the Plaintiffs' claims against him were such as to justify an award of fees under O.C.G.A. § 9-15-14. Mr. Dixon's counsel cross-examined Mr. Hubert's witnesses and then Mr. Dixon put on his own case, including witnesses and documentary evidence. *See* T. 1-485.

On December 19, the trial court filed an opinion and order awarding Mr. Hubert and CHWJW their fees. *See* R. 1618. Because it was not asked by any party to do so, the Court did not file findings of fact and conclusions of law. The Georgia Civil Practice Act provides that in all nonjury trials in courts of record, "*the court shall upon request of any party* made prior to such ruling, find the facts specially and shall state separately its conclusions of law." *See* O.C.G.A. § 9-11-52(a) (emphasis added).

Petitioner filed an application for discretionary appeal to the Court of Appeals. The Court of Appeals denied the application and denied Mr. Dixon's motion

for rehearing, both without opinion. *See* Appendices I, H to Petition for Writ of Certiorari.

Mr. Dixon then petitioned the Supreme Court of Georgia for a writ of certiorari. The Georgia Supreme Court granted the writ and remanded to the Superior Court for findings of fact and conclusions of law (even though neither party had requested them in the trial court). *See* Appendix G to Petition for Writ of Certiorari. The Superior Court complied. *See* Appendix E to Petition for Writ of Certiorari. Thereafter, the matter was briefed and orally argued in the Supreme Court, which then affirmed the lower court without opinion. *See* Appendix D to Petition for Writ of Certiorari.

These are the facts of this case. It is appropriate, however, to address more specifically some of the more egregious misstatements in the Petition for Certiorari.

First, the Plaintiffs' claims did not have anything to do with the "Strategies & Tactics Memo." Mr. Dixon's reliance on the Memo, which is actually entitled "Carport—Legal *Questions* & Strategy" ("Legal Questions Memo" or "Memo") is an attempt to come up with a justification for the suit after the fact. The Complaint makes no mention whatsoever of the Legal Questions Memo, or any publication of it. In his deposition, Mr. Lostocco testified that the only basis for his defamation action against Mr. Hubert was the Hubert letter. *See* Lostocco Depo. at 210, Appendix B at 11a. In the Plaintiffs' responses to Mr. Hubert's interrogatories, no mention was made of the Memo, and in neither Mr. Dixon's nor the Plaintiffs' brief opposing Mr. Hubert's motion for award of attorneys' fees is the Memo treated as a basis for the action.

See R. 255-304, 327-48. Moreover, even if it were appropriate for the Court to consider this post hoc justification, the Legal Questions Memo does not include any statements of fact, but merely topics as to which Mr. Aycock thought Mr. Hubert should inquire.

Second, it is not true that Mr. Hubert "was specifically retained by Mr. Aycock to accomplish the expressly stated goals outlined in the Strategies & Tactics Memo," as Mr. Dixon asserts as fact. Petition for Writ of Certiorari at 3. Mr. Hubert testified that he was hired to help Mr. Aycock avoid losing any more of the money he and Tripoint had invested in APVI. T. 139-42. There is no evidence whatsoever to the contrary.

Third, Mr. Hubert never made any "threats" to anyone, as Petitioner insists. *See* Petition for Writ of Certiorari at 3. He wrote a letter to his own client in which he stated the view that there existed facts that suggested that one or more crimes might have been committed. He was right to be concerned since Mr. Lostocco had engaged in large cash transactions with the Carport that might have involved money laundering, tax fraud, or both. *See* T. 62-63.

Fourth, it is not true, as he would have this Court believe, that Petitioner asserted his constitutional attack on O.C.G.A. § 9-15-14 in every court. *See* Petition for Writ of Certiorari at 2. On the contrary, Dixon filed a motion in the trial court asking for a continuance and an evidentiary hearing before the Court without a jury. In the motion, he said that *if he did not get such a hearing* then, in that event, section 9-15-14 would be unconstitutional. *See* Appendix A at 6a. Once the continuance and evidentiary hearing

were granted, he was not heard from again on any constitutional issue.

Fifth, it is not true that the trial court "ruled that Dixon's good faith and due diligence were not relevant." Petition for Writ of Certiorari at 6. A reading of the relevant pages of the transcript indicates that the trial court rendered a ruling only as to Mr. Dixon's testimony concerning another attorney's opinion. *See* T. 315-21. The court then expressly permitted Mr. Dixon to testify about the new theories of law he was trying to create. T. 321.

The court did state, halfway through Mr. Dixon's explanation of the new theories he was pursuing, that the court did not see how those theories had anything to do with this case. T. 318. Put in context, however, this was not a ruling on the relevance of good faith in general: it was a ruling on whether even the theory Mr. Dixon was espousing would overcome the legal obstacles in suing *Mr. Hubert* in addition to Mr. Aycock. Everything to which Mr. Dixon had testified before the court made the statement had had to do with publication of a document among *partners*, not as between an attorney and his client. *See* T. 315-17.

Sixth, it is absolutely false that the trial court "refused to allow attorneys Dixon called as witnesses to testify concerning . . . their concurrence with his analysis of the issues of attorney-client privilege, privilege, and publication." Petition for Writ of Certiorari at 6, 7. Indeed, conspicuously absent from the trial were any attempts to call the attorneys with whom Mr. Dixon claims to have spoken on the justifiability of the case. At the trial Dixon testified that he talked with some lawyers who concurred with his analysis of the case. Since those lawyers could have been sub-

poenaed to testify, the Court refused to permit Dixon to give expert testimony for them. *See* T. 311.

The foregoing are merely examples of the misstatements of the record contained in the Petition. There are so many of them that it would be impossible in thirty pages to correct them all. Many of them—with each new brief additional ones crop up—were made in briefs to the Georgia Court of Appeals and Supreme Court, which rejected them but did not dignify them with an opinion.

In sum, the facts boil down to these. Mr. Dixon brought a defamation suit on behalf of his client for what Mr. Hubert said in a letter of advice to *his* client. In doing so, Mr. Dixon had no evidence to suggest either that Mr. Hubert intended the letter to be distributed—or in legal terms, published—or that Mr. Hubert acted with malice that would overcome the attorney-client privilege.

Mr. Dixon's suit also alleged that Mr. Hubert had invaded Mr. Lostocco's privacy. As it turned out, this complaint was directed at whoever sent an article discussing a sexual harassment suit against Mr. Lostocco to Mr. Lostocco's wife. Again, there was no evidence that Mr. Hubert was involved in any way.

Mr. Dixon's suit also alleged that Mr. Hubert had tortiously interfered with Mr. Lostocco's contractual relations with The Carport. And once again, there was no evidence of malice to overcome the attorney-client privilege applicable to the Hubert letter. Additionally, there was no evidence that it was the letter that caused The Carport partnership to fire Mr. Lostocco as managing partner. Instead there was evi-

dence that Mr. Lostocco was fired when an outside audit revealed Mr. Lostocco's mismanagement.

Mr. Dixon now wishes to avoid accountability for his actions by claiming that he has been denied his constitutional rights. In truth, however, he has never been denied anything he asked for, and every procedural issue he properly raised was actually decided in his favor.

ARGUMENT

In what is now his sixth appellate brief, Petitioner continues to assert that the trial he was afforded violated his right to due process and that the statute under which Respondent was awarded attorneys' fees violates the equal protection clause. In each of their appellate responses, Respondents have pointed out that Petitioner never raised any due process or equal protection objections in the trial court other than demands for a continuance, discovery, the opportunity to present witnesses, the opportunity to cross-examine witnesses, and a trial, *all of which he received.* Yet still, in his seventh appellate brief, Petitioner will not own up to the fact that he raised constitutional issues only on appeal, after the frivolousness of his conduct in suing Respondents had been conclusively determined. He apparently feels no qualms about ignoring what this Court and the courts of Georgia require with respect to the preservation of objections.

Because Petitioner comes to this Court raising issues on which the trial court had no opportunity to rule, his Petition for Writ of Certiorari should be denied. For sound reasons of comity and judicial economy, this Court has long held that it will not decide questions not raised in the lower court. *Youakim v.*

Miller, 425 U.S. 231, 234 (1980); *Adickes v. Kress & Co.*, 398 U.S. 146, 147 n.2 (1970); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981). Indeed, it is likely because the Georgia appellate courts abide by this same rule that they affirmed the trial court's judgment without opinion. *See Frashier v. State*, 217 Ga. 593, 593, 124 S.E.2d 279 (1962); *Renfroe v. Wallace*, 214 Ga. 685,686, 107 S.E.2d 225 (1959).

The Petition should also be denied because it does not involve any issues appropriate for this Court's consideration under United States Supreme Court Rule 10. The Georgia Supreme Court's decision does not conflict with the decision of any other state court of last resort or a court of appeals, and even Petitioner does not so claim. *See* Supreme Court Rule 10(b). Nor is there involved "an important question of federal law which has not been, but should be, settled by this Court," or a decision that conflicts with decisions of this Court. *See* Supreme Court Rule 10(c). All that is involved is an award of attorneys' fees—rendered only after discovery and a trial—against an attorney who abused the judicial process by bringing a patently frivolous action. Moreover, the facts involved are so extreme that a similar case is unlikely to arise.

CONCLUSION

Because Petitioner never raised the constitutional issues he argues, was granted everything he asked for by the trial court, and has presented no reasons why the writ of certiorari should be granted, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDICES

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APPENDIX A

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE
NO. D-61506

ALEXANDER H. LOSTOCCO, MMANTEC, INC., AND PROFESSIONAL AUTO CARE, INC.

PLAINTIFFS

VS.

S. ALAN AYCOCK, TRIPOINT DEVELOPMENT GROUP, INC., TRIPOINT HOLDINGS, LTD., RICHARD N. HUBERT, and CHAMBERLAIN, HRDLICKA, WHITE JOHNSON & WILLIAMS (a General Partnership) and John Doe, Jane Roe, and others

DEFENDANTS

RESPONDENT DIXON'S MOTION FOR CONTINUANCE AND FOR BENCH TRIAL (WITH ALTERNATIVE MOTION TO DECLARE STATUTE UNCONSTITUTIONAL)

COMES NOW Tyler Dixon, Respondent to the motion filed by the Defendants Richard N. Hubert ("Hubert") and Chamberlain, Hrdlicka, White, Johnson & Williams, ("Chamberlain"), and files this his motion requesting a continuance of the motion hearing currently scheduled for Friday, October 13, 1989,and for an evidentiary bench trial, respectfully showing to the Court as follows:

1. The Respondent Dixon (Movant herein) was formerly counsel for the Plaintiffs in the above styled case, and withdrew from such representation as a result of the development of a conflict of interest requiring the Respondent to be a material witness in the action. Also, the Plaintiffs

voluntarily dismissed their complaint without prejudice on June 22, 1989.

2. On or about July 10, 1989 the Movants Hubert and [p. 2] Chamberlain filed a motion pursuant to O.C.G.A. Section 9-15-14 for attorneys fees, seeking such relief from the Plaintiffs and their former counsel, the Respondent Dixon.

3. Upon the service of said motion by Movants Hubert and Chamberlain served by mail on July 10, 1989, the Respondent Dixon was, *for the very first time*, made a party litigant to this action.

4. Within the time prescribed by law, the Respondent Dixon filed and served his response to said motion on August 14, 1989. Therefore, the issue was joined as to the Respondent Dixon for the first time on August 14, 1989.

5. At the time, the case was scheduled for Arbitration in September, but that was removed at the instance and request of other parties because of problems with their schedules. The case was again placed upon an arbitration calendar for October 13, and the related *Yost* counterclaim appeared on a jury trial calendar for October 9, 1989, but at the request of Movants Hubert and Chamberlain, the case has been removed from the arbitration calendar and from the trial calendar, (over the objection of the Plaintiffs) but the case has not been removed from the motions calendar. The Plaintiffs, through their counsel, Janet Litt, have requested that the case be continued from the October 13 motions calendar, but the Movants Hubert and Chamberlain have objected to such continuance, and have indicated that the other Movants (Aycock/Tripoint) join in that objection.

6. The Respondent Dixon has been "joined" (by O.C.G.A. Section 9-15-14 motion) as a party to this case in which more than $48,000.00 damages are sought against him. Respondent Dixon is [p. 3] entitled to an evidentiary trial,

including the right to present witnesses on his behalf, and the right to confront and cross examine those witnesses presented by other parties. To deny such a right would be a denial of Respondent Dixon's constitutional rights of due process and equal protection under the Georgia and U.S. Constitutions. U.S. Const., Amend. V and Amend. XIV, Section 1; Ga. Const., Art. I, Section 1, Par. 1 and Par 2.

7. The Court has indicated that it intends to allow each side only fifteen minutes oral argument at the hearing on October 13, 1989. That would mean that the Respondent Dixon would be exposed to a possible adverse money judgment for damages for more than $48,000.00 approximately two months after the issue was joined as to Respondent Dixon without a trial. Fifteen minutes of oral argument (which must be shared with counsel for the Plaintiff Respondents) is clearly not a "fair hearing" as contemplated by due process and equal protection, especially since any ruling by the Court is not subject to a direct appeal. This effectively denies Respondent Dixon a sufficient time within which to conduct discovery, obtain appropriate expert witnesses to testify on his behalf, and to otherwise prepare his defense. Given the voluminous size of the record in this case and the complexity of the issues involved, obtaining an expert witness, and providing such witness with the requisite information and records in order to allow such witness to properly analyze same requires a significant amount of time.

8. Prior to the filing of Movant's motion seeking relief against Respondent Dixon, all of Respondent's efforts in this case [p. 4] were on behalf of the Plaintiffs and directed toward their best interests. Not until Movants made Respondent a litigant by filing their motion, has Respondent been in a position to act on his own behalf or view the case from the perspective of protecting himself.

9. Respondent Dixon has contacted J. Melvin England, Esq. and requested him to testify on Respondent's behalf as an expert witness. Mr. England has agreed. The anticipated testimony from Mr. England is key to Respondent's defense, but Mr. England has advised Respondent that, because of his schedule, he will be unable to adequately prepare and submit his expert opinion (whether in the form of an affidavit or oral testimony) for as much as thirty (30) days. Therefore, Respondent requests a continuance from the motions calendar until such time as said witness has had an opportunity to prepare and submit his expert opinion testimony, and Respondent has had an opportunity to supplement his response, if appropriate, based on such expert opinion testimony. Respondent also contacted Gregory Jones, Esq. who indicated he, too, would testify (either through testimony or affidavit) on Respondent Dixon's behalf. Apparently there was some confusion when the jury trial and arbitration hearing were continued, because Mr. Jones left town and will not be back in town (and available for testimony or execution of an affidavit) until October 16, 1989.

10. Furthermore, the Respondent is entitled to discovery. Substantial damages are being sought against Respondent, and it would be unjust and unlawful to require the Respondent to respond for final adjudication without first affording the Respondent an opportunity at proper discovery as in all other civil cases. [p. 5] Uniform Superior Court Rule 5 provides that all discovery must be completed within six months of the filing of the answer (unless the time is extended). While this Rule does not purport to guarantee litigants six months to complete discovery, it should be considered as an influential guideline as to what time period is reasonable for the completion of discovery in the normal course. In that regard, it should be noted that the parties to the main case all consented and stipulated to an extension of the discovery period in the main case. This would imply that the main case was sufficiently

complex as to require additional time for the completion of discovery. Furthermore, it should be noted that the case was dismissed voluntarily by the Plaintiffs prior to the expiration of such extended discovery period, and that discovery was not complete in the main case at the time of such dismissal. In their motions and supplemental briefing, the Movants have now raised virtually all of the issues which would or could have been adjudicated in the main case, as well as other issues.[1] These issues require further discovery, especially on the part of Respondent Dixon who had no opportunity to conduct discovery on his own behalf or from the perspective of claims asserted against him until July, 1989.

11. Given the substantial relief being sought against Respondent Dixon by Movants Hubert and Chamberlain (currently in excess of $48,000.00 with the suggestion by Movants Hubert and [p. 6] Chamberlain that said claim will continue to increase), the Respondent Dixon should be provided the same opportunity to defend himself as is afforded all Defendants in civil litigation. Namely, Respondent Dixon should be allowed a reasonable opportunity to conduct discovery, and thereafter have an evidentiary trial which would include the right to call witnesses to testify on his behalf, and the right to be confronted by and cross examine those witnesses called by his adversaries and other parties. A denial of such right and opportunity would be a denial of Respondent Dixon's constitutional rights under the Georgia and U.S. Constitutions. This denial would be especially prejudicial to Respondent Dixon given the fact that pursuant to O.C.G.A. Section 5-6-35(a)(10), rulings or orders entered on motions filed under O.C.G.A. Section 9-15-14 are not subject to direct appeal. Therefore, to have any order of this Court reviewed on such a motion, an

[1] For example, none of the Defendants raised the affirmative defense of "truth" in their defensive pleadings in the main case, yet they now seem to be arguing that issue in their O.C.G.A. Section 9-15-14 motions.

appealing party must apply to the appellate court for the right to appeal. Therefore, construing O.C.G.A. Section 9-15-14 and O.C.G.A. Section 5-6-35(a)(10), together, any construction or application of said statutes which would deny a respondent's right to discovery and an evidentiary trial (including the right to call witnesses on his on behalf and to confront and cross examine those witnesses called to testify against him), would subject a respondent to the imposition of a money judgment without due process *and* without any vested right to have the trial court's ruling reviewed by an appellate court. Such a construction or application would clearly be an unconstitutional denial of due process and equal protection.

WHEREFORE, the Respondent respectfully moves this Court for [p. 7] an Order removing this case from the October 13, 1989 motions calendar and continuing this case until some date after January 14, 1990 which would be six months after August 14, 1989, (the date of Respondent Dixon's initial response in this case) so that Respondent Dixon can conduct the necessary or appropriate discovery; and for an Order thereafter scheduling this case for a bench trial involving oral testimony in accordance with the procedures commonly followed in civil cases, including the right of the Respondent Dixon to confront and cross examine those witnesses called to testify or submit evidence against Respondent Dixon; that in the event said statutes are to be construed so as to deny respondents the right to discovery and a trial (including the right to present oral testimony, and the right to confront and cross-examine those testifying against Respondent) then Respondent Dixon moves for an Order of this Court striking down O.C.G.A. Section 9-15-14 as being violative of the due process and equal protection under the Georgia and U.S. Constitutions (cited above), and Respondent Dixon prays for such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted,

[s]_____

Tyler C. Dixon
Pro se
State Bar No. 223400

Raiford, Dixon & Thackston
120 Allen Road
Atlanta, Georgia 30328
404-847-0860

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

CIVIL ACTION FILE
NO. D-61506

ALEXANDER H. LOSTOCCO, MMANTEC, INC., AND PROFESSIONAL AUTO CARE, INC.

PLAINTIFFS

VS.

S. ALAN AYCOCK, TRIPOINT DEVELOPMENT GROUP, INC., TRIPOINT HOLDINGS, LTD., RICHARD N. HUBERT, and CHAMBERLAIN, HRDLICKA, WHITE JOHNSON & WILLIAMS (a General Partnership) and John Doe, Jane Roe, and others)

DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned, certifies that he has this day served opposing counsel with a genuine copy of the foregoing Motion for Continuance and for Bench Trial and Brief in support of said motion.

Such service was accomplished by hand delivery to said counsel as follows:

Hugh W. Gibert, Esq.
Arnall Golden & Gregory
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Atlanta, Georgia 30309

This 11th day of October, 1989.

Respectfully submitted,

[s]_____

Tyler C. Dixon
Pro se
State Bar No. 223400

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404-847-0860

APPENDIX B

**IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON
STATE OF GEORGIA**

CIVIL ACTION FILE NO. D61506

ALEXANDER H. LOSTOCCO, MMANTEC, INC., and PROFESSIONAL AUTO CARE, INC.,

Plaintiffs,

vs.

S. ALAN AYCOCK, TRIPOINT DEVELOPMENT GROUP, INC., TRIPOINT HOLDINGS, LTD., RICHARD N. HUBERT, and CHAMBERLAIN, HRDLICKA, WHITE JOHNSON & WILLIAMS, (a General Partnership), and JOHN DOE, JANE ROE, and others,

Defendants.

Deposition of ALEXANDER H. LOSTOCCO, taken on behalf of the Defendants Aycock, Tripoint Development Group, Inc., and Tripoint Holdings, Ltd., in accordance with the Georgia Civil Practice Act, before Mary Ruth Miller, Certified Court Reporter and Notary Public, at One Concourse Parkway, Suite 710, Atlanta, Georgia, on the 21st day of March, 1989, at 9:45 a.m.

I wanted to ask everything that relates to Dick Hubert, but I am going to try not to, you know, not to go over all the same ground again. I am not going to go over all the same ground again, though I am not swearing that we won't ever touch on any of the same things, but that's all. I was simply going to do it on the theory that he had a whole lot of things which really are not of much concern to me, I don't think.

Mr. Dixon: Okay. That's fine with me.

CROSS-EXAMINATION

BY MR. GIBERT:

Q. Mr. Lostocco, as you know, I represent Richard Hubert and Chamberlain Hrdlicka, who are the law firm and lawyers who are also the authors of the exhibit today that's been exhibited as D-1, and let's see if I can get through this quickly.

Precisely what are your grievances against Mr. Hubert? Rather, are they limited to that letter?

A. Yes.

Q. Okay. And you have testified that you consider that the letter was defamatory, but all of the other references in the Complaint to the Defendant, well, take, for example, the Defendants in Count 2, Paragraph 22, you use the word "Defendants," plural, but you said "Certain Defendants contracted with persons or

courtroom?

A. I heard his name mentioned and I saw him.

Q. Okay. And you have no reason to suppose that Dick Hubert holds any personal malice or animosity toward you, do you?

A. No.

Q. And you do have such a view about Alan Aycock, I take it?

A. Well, only that somehow or other together they conspired to do this, whatever the reason may be.

Q. I understand that, but you don't—do you believe that Alan Aycock has got some personal animosity toward you?

A. Yes.

Q. Do you believe Dick Hubert's got some personal animosity towards you?

A. I don't know.

Q. You don't have any reason to suppose he would since he never saw you before; is that right?

A. That would appear on the surface.

Q. Okay. And so Dick Hubert writes this letter as a lawyer writing to his client. Is that the interpretation you place on that letter?

A. No.

Q. No?

entirely from the reading of the letter? That's what I want to know.

A. Is this a trial or a deposition?

MR. DIXON: He's asking you a question.

BY MR. GIBERT

Q. A deposition is one of the first stages in a trial, Mr. Lostocco. You can be sure of that.

A. I mean, I answer it and I am being asked the same thing again.

Q. I want you to tell me if you know some facts that indicate to you that Dick Hubert had some purpose to do something other than write and give his client some advice. He, personally, Dick Hubert personally. Do you have some basis for thinking he had some purpose other than to write and give his client some advice?

A. I don't know.

Q. You don't know of any, you don't have any basis?

A. I just said I don't know.

MR. DIXON: Other than what he's already identified. I mean, he's already testified several times.

MR. GIBERT: He's testified that he concludes that from reading the letter. That's the way I interpret that.

MR. DIXON: That's not what he said.

BY MR. GIBERT:

Q. Well, that's what I'm trying to find out. It's a simple question. If there's something else—

A. What is it?

MR. DIXON: He's already testified, the fact that it was ultimately disseminated in connection with the instructions of the letter.

BY MR. GIBERT:

Q. You find some instructions in the letter that the letter be disseminated?

A. Sure. Second page, second or third page.

Q. Where? Are you referring to the language "I would invite you to discuss this with your partners"?

A. Yeah.

Q. Now, it doesn't say, I'd invite you to disseminate this letter, but that is the language you're relying on, "I invite you to discuss this with your partners"?

A. Yeah.

Q. Do you think it's improper for Mr. Aycock to discuss these grievances he had with his partners?

A. All his partners. He didn't discuss them with me.

Q. Well, but would you have found it improper

interrogation and I will simply wait till he's finished and I'll take mine.

MR. DIXON: We've already jumped to you. Like I said when I first agreed to do that, I didn't want to go back and forth. Let's go ahead.

MR. GIBERT: Okay. Then we'll go on. We'll go on.

BY MR. GIBERT:

Q. In Paragraph 11 of the Complaint you say that "The Defendants Hubert and Chamberlain, Hrdlicka," his firm, "delivered the letter of August 22nd with the intent, expectation and foresight that the same," that means the letter, "would be delivered by the Defendants to other persons." Now, what is your evidence in support of that, if any?

A. Just read it in here. It says that he's going to talk about it, "I would invite you to discuss this with your partners."

Q. Is that the entire evidence that you have in support of that statement?

A. I saw the letter in the hands of Dick Felker, didn't I?

Q. Well, the statement is a statement about Dick Hubert's intent and expectation. Now, is the letter, what's in the letter and the fact that Dick Felker had

possession of it your entire evidence on that point?

A. Yeah.

Q. Okay. You said that such was done. What does "such" mean?

A. What paragraph?

Q. Right after that word we were just, sentence were talking about.

A. Which line?

Q. We are in Paragraph 11. You say "such was done as a malicious and wrongful attempt" and so forth. What's the word, what's "such" mean?

A. Dissemination of the letter. That's used in a legal phrase. I am not—

Q. You say, in other words, dissemination of the letter, is that the way you interpret that?

A. That's the way I would interpret it, but then I'm not an attorney and this was written by an attorney.

Q. Was this complaint filed with your approval and consent?

A. Yes.

Q. It speaks on your behalf?

A. Yes.

Q. It makes your contentions?

A. Yes, but it was, you know, it's put into legal terms so, you know, I'm not—

A. Right.

Q. "And continued other malicious, false and defamatory communications," you're not talking about Dick Hubert there, are you?

A. No.

Q. Then you said, "Defendants have also wrongfully invaded the privacy of Plaintiff Lostocco." What does that relate to?

A. It dealt into my personal life, sending letters to my home.

Q. You have no reason to believe Dick Hubert did that?

A. No.

Q. Did you finish your answer when I asked you about privacy?

A. Yes.

Q. Then there are a series of things discussed here when you say Aycock and Tripoint then published the defamatory letter and the thing which they gave just before or just after you left for Paris, you don't have any reason to believe Dick Hubert had anything to do with that, do you?

A. Repeat. Would you please indicate—

Q. This Paragraph 15 of the Complaint, which I think generally talks about the, well, it says Aycock

* * * *